

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-598

July 9, 2003

MAINE PUBLIC UTILITIES COMMISSION
Rulemaking for Exemption of Competitive
Telecommunications Carriers From Certain
Filing and Approval Requirements (Chapter 212)
and an Amendment to Chapter 280.

ORDER ADOPTING RULE

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this Order, we adopt Chapter 212, which establishes exemptions for certain telephone utilities from certain Maine Public Utilities Commission (Commission) requirements related to financial reporting, stock issuances and other financings, and mortgages and disposal of property. The exempted carriers are competitive interexchange carriers (CIXCs) and those competitive local exchange carriers (CLECs) that do not receive universal service funding pursuant to Chapter 288. We also adopt a minor conforming revision to Chapter 280. Chapter 212 exempts certain qualified carriers uniformly from regulatory requirements that are no longer necessary in today's competitive environment.

II. BACKGROUND

By Notice of Rulemaking (NOR) dated April 10, 2003, we initiated a rulemaking, pursuant to 35-A M.R.S.A. §§ 507, 912 and 1105, to exempt Maine telephone utilities from certain reporting and approval requirements relating to financial matters. The proposed exempted provisions were 35-A M.R.S.A. § 504, which requires annual filing of balance sheets; several provisions in 35-A M.R.S.A. §§ 901-911, which establish approval requirements for the issuance of stocks, bonds and notes; and 35-A M.R.S.A. § 1101 and 1103, which require approval of sales, leases and mortgages of utility property and the acquisition of the stock of another utility.

Written comments to the proposed rule could be filed until May 23, 2003. The Commission received comments from Verizon-ME (Verizon) and the Telephone Association of Maine (TAM).

The chapters of Title 35-A (Chapters 5, 9 and 11) that contain the exempted sections are generally designed to protect captive ratepayers of monopoly utilities. In order to exempt a utility from provisions in these chapters, the Commission must find that the exemption is in the public interest and will not have a negative impact on competitive markets for telephone service.

We make the finding that the statutory provisions that we waive by this rule should not apply to CLECs that do not receive universal service funding pursuant to Chapter 288 and to all CIXCs. The term CIXCs is defined for the first time in this rule and includes all interexchange carriers that are not also Incumbent LECs (ILECs). Since CLECs and CIXCs operate in a competitive environment, we do not regulate their rates, and thus the provisions in Chapters 5, 9, and 11 related to their costs and indirectly to their rates should no longer apply to them.

The rule reduces the regulatory burden on the CLECs and CIXCs, which may help to lower their costs and their rates and to make Maine a more attractive state in which to do business. This serves the public's interest by providing Maine consumers with additional, less expensive options. The telephone utilities exempt from the chapters in this rule remain subject to all other applicable provisions in Title 35-A M.S.R.A. and Commission Rules. Neither commenter disagreed with these proposed exemptions.

In the NOR, we stated that we intend to continue to apply the statutory approval requirements in Chapter 5, 9 and 11 of Title 35-A to ILECs. We regulate the rates of all ILECs, by establishing a revenue requirement pursuant to rate of return ("traditional") regulation in the case of the ILECs other than Verizon and, in the case of Verizon, either by rate of return regulation or pursuant to an alternative form of regulation (AFOR) (i.e., a price cap mechanism).¹ Verizon continues to have very substantial market share in those areas where it provides local exchange service, particularly in the residential market. Under the original and modified versions of alternative forms of regulation (AFORs) for Verizon, local rates have been capped because of Verizon's near monopoly status. Even though a rate cap (if re-implemented) removes the direct linkage between costs and rates, it may be necessary at some future time to review Verizon's costs.² We therefore find it is in the public interest for Verizon to continue to be subject to these approval requirements.

¹ The form of regulation for Verizon is presently under review pursuant to a reversal and remand by the Law Court of the Commission's Order of June, 2001, that implemented a revised AFOR. *Office of the Public Advocate v. Public Utilities Commission*, 2003 ME 23, ___ A.2d ___. See *Public Utilities Commission, Investigation into Verizon Maine's Alternative Form of Regulation*, Notice of Further Proceedings Following Remand (March 19, 2003).

² Presently, Verizon's local rates are not capped under the interim form of regulation presently in effect following vacation and remand by the Law Court of the Commission's June, 2001 Order establishing the modified AFOR. *Office of the Public Advocate v. Public Utilities Commission and Verizon New England, Inc.*, 2003 ME 23, 816 A.2d 833. If Verizon or other persons attempt to initiate a rate proceeding, it will be necessary to determine the nature of regulation of Verizon's local rates. The options of course include rate of return regulation.

We also stated that other Maine ILECs (the independent telephone companies or ITCs) arguably have even greater insulation from competition.³ Moreover, all continue to be subject to traditional regulation. Because we directly regulate their rates (and must therefore have information concerning their costs), we find, as in the case of Verizon, that it is not appropriate, at this time, to waive these approval request requirements. The required approvals relate to matters that can affect the costs of those utilities.

Verizon and TAM both disagree with the foregoing analysis. Verizon argues that because the Commission directly regulates the rates and charges of ILECs it is “less likely that ILECs could somehow pass along inappropriate costs.” Verizon also argues that ILECs are subject to the same competitive pressures as CLECs and should be exempt for the same reasons.

Verizon’s second point is that the exemptions in the rule may actually “encourage a less efficient competitive outcome among competing carriers” because by reducing the burden for some carriers and not others, prices may remain artificially high. These arguments are unpersuasive for two reasons. First, we actively regulate Verizon’s rates, and there is no indication that the costs of complying with the regulatory requirements of Chapters 5, 9, and 11 exceed the benefits to consumers of that active regulation. Second, at least for Verizon, the cost of complying with those chapters is minimal. Verizon has made virtually no filings under chapters 9 and 11 in recent years.⁴ The filing made by Verizon pursuant to 35-A M.R.S.A. § 504 is an annual filing and is largely a copy of a filing Verizon makes to the FCC. The burden placed on Verizon is therefore quite small.

TAM’s comments concern “the equity of creating a new category of service provider, the Competitive Interexchange Carrier (CIXC), resulting in the placing of Interexchange Carriers (IXCs) which offer intrastate toll service who are *affiliated* with an ILEC at a competitive disadvantage in the marketplace” (emphasis added). The rule’s exemptions *do* apply to IXCs that are only *affiliated interests* (as that term is defined in 35-A M.R.S.A. § 707(1)(A)) of ILECs. To the extent that TAM’s comments apply only to such affiliates (which generally are separate corporations), its concern is unfounded.

³ All of Maine’s ITCs are “rural telephone companies” as defined in 47 U.S.C. § 153(37); therefore, the “rural exemption” of 47 U.S.C. § 251(f)(1)(A) applies. Unless the rural exemption is waived, pursuant to 47 U.S.C. § 251(f)(1)(B), a rural ILEC is not required to provide interconnection to a competitive LEC. Therefore, any actual competition by a CLEC in a rural ILEC service area must be through the provision of its own facilities.

⁴ Verizon is already exempt from the need, under 35-A M.R.S.A. § 901, to obtain approval for issuances of stocks and bonds because it is not a utility “organized and existing or incorporated under the laws of this State.”

It is also possible, however, to read TAM's comments as expressing a concern about the failure of the Rule to apply the exemptions to ILECS that provide interexchange service in addition to local exchange service (or at least to apply the exemptions to the interexchange portion of their operations). At this time, the only ILECs that also offer interexchange service are Verizon, Saco River Telegraph and Telephone Company, and Pine Tree Telephone Company. We intentionally excluded ILECs that offer interexchange service from the definition of CIXC because interexchange costs are not separated from local costs (and cannot be easily separated).⁵ As we stated in the NOR, we remain concerned about the overall costs of those carriers because of their actual or potential effect on both local and interexchange rates.

To the extent that Verizon or a TAM company can demonstrate that they are able to effectively separate IXC costs from the ILEC's costs, it can request that we amend this Rule or file a waiver request pursuant to Chapter 110 § 103.

The rule also does not exempt CLECs that receive Universal Service Funding (USF) pursuant to Chapter 288 from these statutory provisions. We must give greater oversight to their costs because we require a demonstration of need before we approve USF funding. We did not receive any comments arguing that those CLECs should be exempt.

III. DISCUSSION OF RULE

A. Section 1: Definitions

The definitions of CLEC, ILEC and IXC are taken from Chapters 280 and 288. A "CIXC" is a competitive interexchange carrier that is *not* also an ILEC. Presently, the only ILECs that are also IXCs are Verizon, Pine Tree Telephone Company and Saco River Telegraph and Telephone Company.

B. Section 2: Accounting Requirements, Chapter 5

Pursuant to 35-A M.R.S.A. § 507, the Commission may adopt, by rule, standards and procedures for granting to a telephone utility or a specified group of telephone utilities an exemption or exemptions from all or specified portions of section 504. Section 504 describes requirements related to the time of closing accounts and filing balance sheets. The Rule exempts all CIXCs and all CLECs that do not receive universal service funding from Section 504(2), which requires the taking and filing of balance sheets. The exemption will reduce filing requirements for competitive carriers. We did not propose exemptions from either subsection 1 or 3 of Section 504. Subsection 1 sets the date for the closing of accounts; it does not establish a filing

⁵ Any attempt to separate interexchange from local costs necessarily requires allocating costs of facilities that are used for both local exchange and interexchange service. There is no single "best" way to make those allocations.

requirement or deadline. It is administratively simpler and potentially more productive (e.g., facilitates comparison of utilities' performance, condition of the industry, etc.) if all telephone utilities have the same reporting year. Section 504(3) allows the Commission to grant extensions from the subsection 2 filing deadline; for those carriers that must still file pursuant to subsection 2, a specific exemption of this Rule is unnecessary.

C. Section 3: Approval Of Stocks, Bonds, And Notes By Public Utilities Commission, Chapter 9

Pursuant to 35-A M.R.S.A. § 912, the Commission may adopt, by rule, standards and procedures for granting to a telephone utility or a specified group of telephone utilities an exemption or exemptions from all or specified portions of Chapter 9. Chapter 9 requires utilities to seek the Commission's approval for issuance of stocks, bonds and notes. The Rule exempts from 35-A M.R.S.A. §§ 901-904, 907, 908, 910, and 911 all CIXCs and CLECs that do not receive state universal service funding pursuant to Chapter 288. We do not actively regulate the rates for these telephone companies, and therefore we no longer need to regulate how the companies borrow money.

The Rule does not provide exemptions from Sections 905, 906 or 909. Section 905 is not a filing or approval requirement; it addresses the validity of stocks, bonds, notes or other evidences of indebtedness when issued or sold pursuant to, or in reliance on and in accordance with, any order, authorization or decision of the Commission pursuant to Chapter 9.⁶ We decide that this Rule, authorized by Section 912, constitutes a Commission "decision" pursuant to Chapter 9 for the purposes of Section 905. Therefore, a stock, bond, note or other form of indebtedness that is issued without Commission approval, but in reliance on the exemption in this Rule, will not become invalid by virtue of this Rule later being vacated, modified, or otherwise held to be wholly

⁶Section 905 states:

Any stocks, bonds, notes or other evidences of indebtedness issued or sold pursuant to or in reliance on and in accordance with any order, authorization or *decision* of the commission pursuant to this chapter, and at least 5 business days after the date of the order, authorization or decision, shall be valid, binding and enforceable in accordance with their terms, including the terms of any agreement, instrument or document under or pursuant to which the stocks, bonds, notes or other evidences of indebtedness are issued, notwithstanding that the order, authorization or decision of the commission is later vacated, modified or otherwise held to be wholly or partly invalid, whether by the commission upon a petition for rehearing or reopening, or otherwise, or by a court, unless operation of the order, authorization or decision of the commission has been stayed or suspended by the commission or a court of competent jurisdiction prior to the issuance of the stocks, bonds, notes or other evidences of indebtedness.
(Emphasis added)

or partly invalid. Section 906 applies only to transmission and distribution utilities. Section 909 is itself an exemption since it states that Commission approval is not required for certain stocks. No additional exemption is necessary.

D. Section 4: Authorization Of Sales, Leases, And Mortgages Of Property, Chapter 11

Pursuant to 35-A M.R.S.A. § 1105, the Commission may adopt, by rule, standards and procedures for granting to a telephone utility or a specified group of telephone utilities an exemption or exemptions from all or specified portions of Chapter 11. Chapter 11 requires utilities to obtain Commission authorization for sales, leases, and mortgages of property. The Rule exempts from Sections 1101 and 1103 all CIXCs and CLECs that do not receive state universal service funding pursuant to Chapter 288. We exercise only limited regulation over the rates of these telephone companies, and therefore we no longer need to regulate how they manage their property. We do not create an exemption from Section 1102 because that section is itself an exception to the approval requirement in Section 1101; no Commission approval is necessary when property is not necessary or useful. We also did not propose to exempt telephone utilities from Section 1104, Abandonment of Property or Service, because abandonment procedures will be addressed in a separate Commission rulemaking that will include additional issues related to abandonment.

Section 1103 is entitled "Transfer of Utility Stock," but it actually requires approval for one public utility to "purchase, acquire, take or hold" the stock of another public utility. The exemption applies only to CIXCs and certain CLECs; an ILEC will still need approval to acquire the stock of any other public utility. We are, of course, concerned about these transactions from the opposite perspective – the possible effect on ratepayers resulting from the acquisition of ILEC stock by other utilities (or anyone else). The statute, however, does not require the utility whose stock is being acquired to obtain approval. While we could have proposed that the exemption in the Rule would not apply when the stock being acquired was that of an ILEC, we did not. We believe adequate protection is provided by the reorganization statute, 35-A M.R.S.A. § 708(2), which requires approval for any reorganization of a utility. The acquisition of 10% or more of a utility's stock creates an "affiliated interest" of the utility (35-A M.R.S.A. § 707(1)(A)) and is therefore a "reorganization" (35-A M.R.S.A. § 708(1)(A)) of that utility.

We note that in Chapter 280, § 12 and in all orders granting authority to provide telephone service, we have generally exempted CIXCs and CLECs from the need to obtain approval of reorganizations under Section 708(2). If, however, an ILEC were to acquire 10% or more of the stock of another ILEC, both ILECs would need approval under Section 708(2). In addition, the acquiring ILEC would need approval under Section 1103 for any amount of stock it might acquire.

Requiring approval under the reorganization statute, rather than under Section 1103, is appropriate because it requires the ILEC, rather than the acquiring CIXC or

CLEC, to apply for the approval. We are more concerned with the effect on the utility whose stock is being acquired than with the activities of acquiring CLECs or CIXCs.

E. Section 5: Revocation Of Exemptions

As permitted by the statutory provisions allowing these exemptions, we will be able to maintain consumer protections by retaining the authority to revoke the exemptions granted in this Rule for cause.⁷ A revocation may be in whole or in part and may be specific to a single telephone utility or a single utility service. The Rule establishes market share and market stability as grounds that may constitute just cause for revoking an exemption.

IV. REVISION TO CHAPTER 280 OF THE COMMISSION'S RULES

Section 13, Applicability of Other Statutes, is deleted from Chapter 280 of our Rules. The sole function of Section 13 was to provide notice to competitive IXC's and CLECs about the approval requirements of Chapters 9 and 11. Chapter 212 waives those requirements for all of those carriers. If retained, Section 13 of Chapter 280 would be misleading.

V. FISCAL AND ECONOMIC EFFECTS

"Fiscal Impact" is defined in 5 M.R.S.A. § 8063 as "the estimated cost to municipalities and counties for implementing or complying with the proposed rule." In accordance with 5 M.R.S.A. § 8057-A(1), the Commission expects no fiscal impact on municipalities or counties. We did not receive any comments to the contrary.

Accordingly, we

ORDER

1. That the attached Chapter 212, "Exemption of Competitive Telecommunications Carriers From Certain Filing and Approval Requirements" is hereby approved;
2. That the attached change to Chapter 280, "Provision of Competitive Telecommunications Services" is hereby approved;
3. That the Administrative Director shall file the Rule and amendment and related material to the Secretary of State; and
4. That the Administrative Director shall notify the following of the adopted rules:
 - a. All telephone utilities in the State;

⁷ Each of the statutory sections authorizing these exemptions expressly allows such revocations. For example, 35-A M.R.S.A. § 912 provides as follows: "For good cause, as defined by the commission by rule, the commission may revoke any exemption granted pursuant to this section."

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond